

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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SEP 25 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL S. RHINEHART,)	
)	
Petitioner Employee,)	2 CA-IC 2009-0007
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
THE INDUSTRIAL COMMISSION OF)	Rule 28, Rules of Civil
ARIZONA,)	Appellate Procedure
)	
Respondent,)	
)	
TRULY NOLEN AMERICA,)	
)	
Respondent Employer,)	
)	
TRULY NOLEN OF AMERICA, INC.,)	
)	
Respondent Insurer.)	
)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20032620271

Insurer No. 152-98422-LO

Deborah P. Hansen, Administrative Law Judge

AWARD AFFIRMED

Michael S. Rhinehart

Sierra Vista
In Propria Persona

The Industrial Commission of Arizona
By Andrew F. Wade

Phoenix
Attorney for Respondent

Fennemore Craig
By Scott M. Finical and Elizabeth Whitton

Phoenix
Attorneys for Respondent Employer
and Respondent Insurer

B R A M M E R, Judge.

¶1 This statutory special action challenges the Industrial Commission’s decision dismissing petitioner Michael Rhinehart’s request for hearing because he failed to appear at the scheduled prehearing conference and hearing. We affirm the award.

Factual and Procedural Background

¶2 “On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission’s findings and award.”¹ *Roberts v. Indus. Comm’n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). Rhinehart was injured in an industrial accident on August 14, 2003, while acting in the course and scope of his employment with Truly Nolen of America, Inc. (Truly Nolen). Truly Nolen’s workers’

¹Rhinehart does not support his statement of facts by record citations, instead citing to various documents appended to his opening brief. *See* Ariz. R. Civ. App. P. 13(a)(4) (statement of facts in appellant’s brief must contain “appropriate references to the record”); Ariz. R. P. Spec. Actions 10(k) (rules of appellate procedure apply to appellate review of Industrial Commission awards). We have therefore disregarded his statement of facts and instead rely on Truly Nolen’s statement of facts and our review of the record. *See Flood Control Dist. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985).

compensation insurance carrier accepted his claim for benefits in September 2003. The carrier then closed the claim effective March 25, 2008, with a forty-one percent permanent disability to Rhinehart's lower right leg.² Rhinehart filed a request for hearing protesting that decision on June 18, 2008. *See* A.R.S. § 23-941.

¶3 The Administrative Law Judge (ALJ) scheduled the hearing on Rhinehart's request for September 16, 2008. She also scheduled an informal telephonic prehearing conference for August 13, 2008, warning the parties that failure to appear could result in sanctions, including dismissal. Rhinehart contacted Truly Nolen, requesting the conference be continued because surgery he was having unrelated to his industrial injury conflicted with it. The ALJ granted Truly Nolen's request to continue the hearing and conference, rescheduling the conference for September 30 and the hearing for October 27. In a letter dated September 19, Rhinehart asked the ALJ to reschedule the conference and hearing again, stating he needed more time to hire an attorney and was suffering from a variety of medical difficulties.³ Over Truly Nolen's objection, the ALJ rescheduled the prehearing conference for October 6, but left the October 27 hearing date unchanged. Rhinehart did not appear at the prehearing conference, and the ALJ was unable to reach him by telephone. The ALJ then continued the hearing until December 2, 2008. On November 18, 2008, Rhinehart telephoned the ALJ and again requested the hearing be rescheduled, telling the ALJ that

²Truly Nolen apparently became self-insured while Rhinehart's request for hearing was pending.

³Rhinehart had been represented by counsel when he filed his request for hearing, but that attorney withdrew soon thereafter.

“things have happened recently” and he had been unable to hire an attorney. The ALJ rescheduled the hearing to January 9, 2009.

¶4 Rhinehart failed to appear for the January 9, 2009 hearing. The ALJ then dismissed his request for hearing, finding that Rhinehart had not been “excused from attending the hearing,” that it was his burden to establish the elements of his claim, and that he had “abandoned the Requests for Hearing” and therefore had “waived the right to hearing.” Nearly a month later, Rhinehart sent a letter to the ALJ asking that she schedule a hearing in ninety days. The ALJ treated the letter as a request for review of her decision upon hearing. In her decision upon review, the ALJ affirmed her decision dismissing Rhinehart’s request for hearing. This statutory special action followed.

Discussion

¶5 In his opening brief, Rhinehart does not squarely address the ALJ’s decision to dismiss his request for hearing, asserting only that Truly Nolen would not have been prejudiced by the granting of an additional continuance. Moreover, his brief does not contain any cognizable legal argument or citation to authority. Instead, he merely argues that Truly Nolen should not have closed his claim and describes the evidence he would have presented at the hearing and the weaknesses he perceives in the evidence Truly Nolen had submitted to the ALJ. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain “citations to the authorities, statutes and parts of the record relied on”). Rhinehart’s failure to comply with our rules of procedure would justify our summary denial of relief. *See Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998). Truly Nolen, however, has

thoroughly presented the facts and law relevant to determining whether the ALJ abused her discretion by dismissing Rhinehart's request for hearing. *See Nolden v. Indus. Comm'n*, 127 Ariz. 501, 503-04, 622 P.2d 60, 62-63 (App. 1980) (“[E]nforcement by the administrative law judge of the rules of procedure before the Industrial Commission will not be overturned absent a clear showing of abuse of discretion.”). Because we prefer to resolve cases on their merits, we will address that issue. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966).

¶6 The administrative rules governing proceedings before the Industrial Commission require a claimant “to appear personally at any hearing . . . unless excused by the presiding administrative law judge” prior to the hearing. Ariz. Admin. Code R20-5-149. An ALJ may impose sanctions for failure to comply with the administrative rules, including “[d]ismissal of the party’s request for hearing.” Ariz. Admin. Code R20-5-157(A)(1); *see also Lindsay v. Indus. Comm’n*, 115 Ariz. 254, 256-57, 564 P.2d 943, 945-46 (App. 1977). The ALJ may, however, relieve a party from sanctions upon a showing of good cause. Ariz. Admin. Code R20-5-157(B).

¶7 As noted, Rhinehart failed to appear at either the prehearing conference or the hearing itself. Nor did he, before or after either occasion, request that his absence be excused or explain the reasons for his absence. Merely asserting that he had difficulty finding an attorney and that he had health-related issues is insufficient to demonstrate good cause. He did not, for example, assert he was physically unable to attend the hearing or contact the ALJ. *See Lindsay*, 115 Ariz. at 256-57, 564 P.2d at 945-46 (affirming dismissal of request for

hearing where claimant’s only explanation for absence from hearing was that he was “in the armed forces stationed in [another state]” without showing a “good faith attempt to secure petitioner’s attendance”). Standing alone, his failure to appear absent any explanation supports the ALJ’s decision to dismiss his request for hearing. *See id.*; Ariz. Admin. Code R20-5-149, R20-5-157(A)(1).

¶8 Moreover, Rhinehart—unlike Truly Nolen—did not file any medical reports or other evidence with the ALJ before the hearing as required by R20-5-155 of the Arizona Administrative Code. Nor did he request, also pursuant to that section, that any witnesses be subpoenaed. Considering his failure to submit evidence or request subpoenas in conjunction with his failure to appear, we find no fault in the ALJ’s conclusion that Rhinehart effectively had abandoned his request for hearing by failing to appear. Thus, for the reasons stated, we conclude the ALJ did not abuse her discretion in dismissing it. *See Nolden*, 127 Ariz. at 503-04, 622 P.2d at 62-63.

Disposition

¶9 We affirm the award dismissing Rhinehart’s request for review.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge